No. 18-35347

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RYAN KARNOSKI, et al.,

Plaintiffs-Appellees,

STATE OF WASHINGTON,

Plaintiff-Intervenor-Appellee,

v.

DONALD TRUMP, President of the United States, et al.,

Defendants-Appellants.

On Appeal from the United States District Court for the
Western District of Washington

PLAINTIFFS-APPELLEES' ANSWERING BRIEF

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CORPORATE DISCLOSURE STATEMENTS

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiff-Appellee Human Rights Campaign hereby files its corporate disclosure statement and certifies that Human Rights Campaign does not have a parent corporation and that no publicly held corporation holds 10% or more of its stock.

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiff-Appellee Gender Justice League hereby files its corporate disclosure statement and certifies that Gender Justice League does not have a parent corporation and that no publicly held corporation holds 10% or more of its stock. Gender Justice League further certifies that Gay City Health Project serves as the fiscal sponsor for Gender Justice League.

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiff-Appellee American Military Partner Association hereby files its corporate disclosure statement and certifies that American Military Partner Association does not have a parent corporation and that no publicly held corporation holds 10% or more of its stock.

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INTRODUCTION

President Trump stunned even his own military advisers when he abruptly announced through Twitter last year that he was banning transgender people from the military ("the Ban"). This was a stark and unprecedented reversal of policy. Shortly before, the military had undertaken a comprehensive study on its own accord and concluded that barring otherwise qualified transgender people from service would undermine rather than promote military readiness. Every federal court to consider the Ban preliminarily enjoined its enforcement, recognizing the extraordinary injuries it would inflict on transgender people willing to put themselves in harm's way and potentially pay the ultimate price for our country.

Shortly after President Trump announced the Ban, he also ordered the military to implement it. The Secretary of Defense followed his orders. For the next few months, the military went to work executing the policy of their Commander-in-Chief by developing a study and implementation plan for the stated purpose of effectuating the Ban. As expected, the military then delivered exactly what President Trump had ordered: a study and implementation plan that purports to justify the policy decision President Trump already made last year and that contradicts the military's own prior analysis. Armed with nothing but this reverse-engineered material, and the pretense that an implementation plan somehow constitutes a "new" policy, the government sought to dissolve the preliminary

injunction.

The district court saw through this shell game. The core of the Ban remains unchanged: as before, transgender people are barred from serving openly. Accordingly, a transgender person who has completed gender transition, whose gender dysphoria has been resolved, and who otherwise meets every physical and mental qualification to serve based on a rigorous individualized determination, is nonetheless categorically barred from doing so. Nothing in even Defendants' *post hoc* defense can justify that sweeping exclusion, under any level of scrutiny or deference. The district court thus found that the plan to implement the Ban would likely perpetuate unconstitutional discrimination against transgender people and penalize them for exercising their basic rights to liberty and freedom of expression in living openly as who they are.

The district court did not abuse its discretion in finding that Defendants had failed to show a significant change in law or fact to justify now dissolving the injunction and immediately commencing the Ban. Rather, Defendants have merely doubled-down on the same unconstitutional action that threatens to upend the lives of transgender people willing to serve our country. Like other historical exclusions based on race, gender, and sexual orientation for which the military demanded deference, the Ban damages the public interest by depriving our nation of critical talent and by betraying our core constitutional values.

STATEMENT OF THE ISSUE

Whether the district court abused its discretion in concluding that Defendants failed to show a significant change in law or fact to warrant dissolution of the preliminary injunction protecting transgender people against discrimination in military service.

STATEMENT OF THE CASE

I. The Military Ends Its Longstanding Discrimination Against Transgender People.

A. The Military Re-Evaluates Its Discriminatory Policy in Light of Medical Consensus and the Repeal of "Don't Ask, Don't Tell."

In 2010, Congress voted to repeal "Don't Ask, Don't Tell," which had prevented lesbian, gay, and bisexual people from serving openly in the military. SER.184.[1] This development in turn raised questions about the military's policy on service by transgender people, *i.e.*, those whose gender identity does not match their birth-assigned sex. *Id.* "Particularly among commanders in the field, there was an increasing awareness that there were already capable, experienced transgender service members in every branch, including on active deployment on missions around the world." *Id.*

In 2013, the American Psychiatric Association ("APA") revised its *Diagnostic and Statistical Manual of Mental Disorders* to remove "gender identity

[1] "SER" refers to Plaintiffs' Supplemental Excerpts of Record. "ER" refers to Defendants' Excerpts of Record.

disorder" and replace it with "gender dysphoria," a clinical condition associated with the dissonance between one's birth-assigned sex and gender identity, the fundamental internal sense of one's gender that everyone possesses. SER.249-50, 268. It recognized that gender dysphoria is resolvable through well-established and effective protocols, which can include counseling, hormone therapy, and surgical treatment. SER.250-52.

At the time, the Department of Defense ("DoD") had barred transgender people from military service. SER.252-53, 255-56. Although the military generally has different standards for accession (*i.e.*, entrance into the military) versus retention, transgender people were disqualified under both. Thus, a transgender person was barred from joining the military even if his or her gender dysphoria had been fully treated, in sharp contrast to other curable conditions, which did not similarly bar accession. SER.253-54, 256. Likewise, service members who disclosed that they were transgender while serving were deemed "administratively unfit" and subject to discharge. SER.254-56.

In August 2014, a collection of medical and military health experts (including a former Surgeon General) published a peer-reviewed study concluding there was "no compelling medical reason for th[is] ban" and that it was "an unnecessary barrier to health care access for transgender personnel." SER.264. That same month, DoD issued a new regulation that eliminated a military-wide list

of conditions that would disqualify an individual from retention, including the ban on service by transgender persons, and thus allowed each branch to assess the retention of transgender troops on its own. SER.184. By April 2015, the American Medical Association ("AMA"), the largest association of physicians in the United States, announced its support for lifting the ban, declaring that there was no medically valid reason for it. SER.257.

B. The 2015 Working Group and the Carter Policy.

In February 2015, then-Secretary of Defense Ashton Carter was asked at a town hall meeting in Kandahar, Afghanistan about his views on military service by transgender people. SER.184-85. Secretary Carter responded that he had not yet given the issue significant study, but stated that the important criteria was: "Are they going to be excellent service members?" *Id.*

A few months later, Secretary Carter convened a working group to identify policy options regarding military service by transgender people with the goal of maximizing military readiness. ER.432; SER.288. Secretary Carter gave the working group 180 days to present recommendations and explained they should "start with the presumption that transgender persons can serve openly without adverse impact on military effectiveness and readiness, unless and except, where objective, practical impediments are identified"—in other words, to start from the default presumption, like they would for any other group, that discrimination

against transgender people is not warranted unless justified by evidence. SER.111, 185; ER.432.

The working group included approximately twenty-five military and civilian members, with each branch of the service represented by a senior uniformed officer, a senior civilian official, and staff members. SER.288. It extensively reviewed scholarly evidence and consulted with medical, personnel, and readiness experts, health insurance companies, civilian employers, and commanders whose units included transgender service members. *Id.*

As part of its comprehensive review, the working group also commissioned a report from the RAND Corporation, a nonprofit research institution that has provided objective research and analysis to the military for decades. RAND performed a comprehensive study of transgender health care needs and potential costs and assessed whether allowing transgender service members to serve would impact military readiness. SER.288-89. It considered myriad data sources and independently evaluated the experience of other countries with open service. SER.289-90. RAND's resulting report concluded that (1) the military's health system could provide the medical care necessary to treat gender dysphoria; (2) expected health care costs for transition-related care were expected to be "exceedingly small" (0.13% of total active duty health care expenditures); (3) there was "no evidence" of negative impacts on unit cohesion, operational effectiveness,

or military readiness; and (4) the amount of deployable time lost due to transition-related treatment was expected to be "negligible" (0.0015% of available deployment years) even under the most extreme assumptions.[2] ER.370, 375, 384-86, 400, 408-10; SER.289-90.

Beyond RAND's recommendations, the working group reached a number of conclusions based on its own research and analysis: (1) it is common for service members, whether transgender or not, to be non-deployable for limited periods of time due to medical conditions or treatment (like pregnancy, orthopedic injuries, and appendicitis); (2) being transgender is not a mental disorder, and gender dysphoria is resolvable through established medical care; (3) the loss of transgender service members would require costly and time-consuming efforts to replace them; and (4) "banning service by openly transgender persons would harm the military by excluding qualified individuals based on a characteristic with no relevance to a person's fitness to serve." SER.156, 291-92. Based on its comprehensive review, the working group unanimously recommended that transgender people be permitted to serve openly and to join the military provided they meet the same standards as others. SER.156-57, 292.

[2] Defendants claim RAND concluded that a change in policy would have "an adverse impact on health care utilization and costs, readiness, and unit cohesion." Defs.' Br. 5. But the quotation the government misleadingly attributes to RAND actually comes from DoD's own self-serving characterization in the Implementation Plan produced at President Trump's direction. ER.177.

On June 30, 2016, Secretary Carter issued a policy ("Carter policy") that formally directed that the military "should be open to all who can meet the rigorous standards for military service and readiness," and in particular that "transgender individuals shall be allowed to serve in the military." ER.315. The policy did not relax standards for transgender people, Defs.' Br. 31, but instead made clear that they would be "subject to the same standards and procedures as others." ER.315. Transgender service members receiving transition-related care were thus to be treated like any other service member receiving medical treatment, and gender dysphoria was to be treated like other curable medical conditions. SER.257-58.

The Carter policy also provided that, by July 1, 2017, the military would begin accessing transgender recruits whose gender transition was complete and whose gender dysphoria had been resolved for at least 18 months. ER.317-18. Shortly before that deadline, the accessions start date was extended for six months by Secretary of Defense James Mattis to January 1, 2018. ER.217.

II. President Trump's Tweets and 2017 Memorandum Contravene the Medical and Military Consensus.

On July 26, 2017, President Trump abruptly announced the Ban via Twitter: "After consultation with my Generals and military experts, please be advised that the United States Government will not accept or allow[] [t]ransgender individuals to serve in any capacity in the U.S. Military. Our military must be focused on

decisive and overwhelming[] victory and cannot be burdened with the tremendous medical costs and disruption that transgender [*sic*] in the military would entail."[3] ER.142.

President Trump's tweets—supposedly made after "consultation" with his "Generals"—in fact caught his military advisors off guard. The Chairman of the Joint Chiefs of Staff acknowledged to the Service Chiefs that the announcement was "unexpected" and that he "was not consulted." SER.136. White House and Pentagon officials were similarly unable to explain the most basic details about the Ban, and Secretary Mattis, then on vacation, had only one day's notice that the Ban was coming. SER.87. As the former Navy Secretary noted, this "directive to reverse policy … was delivered entirely outside the normal pathway of legitimate orders issued through the chain of command." SER.231.

On August 25, 2017, President Trump issued a memorandum regarding "Military Service by Transgender Individuals," formalizing the Ban and directing the military to (1) ban openly transgender service members, (2) continue banning accessions by transgender applicants, and (3) ban transition-related surgical treatment ("2017 Memorandum"). ER.214-15. President Trump ordered the military to submit a "plan for implementing the general policy" and "specific

[3] The "Ban" refers to Defendants' policy generally prohibiting military service by openly transgender people, as announced in President Trump's tweets and a 2017 memorandum and further detailed in an Implementation Plan discussed below.

directives" of the Memorandum by February 21, 2018, and as part of this "implementation plan," "to address transgender individuals currently serving." *Id.*

On August 29, 2017, Secretary Mattis confirmed that, "as directed," DoD would "develop a study and *implementation plan*" that would "carry out *the president's policy direction*." ER.212 (emphasis added). Secretary Mattis also confirmed that he would establish a so-called "panel of experts … to provide advice and recommendations *on the implementation of the president's direction*" and that he would thereafter "provide [his] advice to the president *concerning implementation of his policy decision*." *Id.* (emphasis added).

On September 14, 2017, Secretary Mattis issued two memoranda concerning implementation of the Ban. First, Secretary Mattis again confirmed DoD "will carry out the President's policy" and, by February 21, 2018, "present the President with a plan to implement [his] policy and directives." ER.208. Second, Secretary Mattis convened the panel to develop that Implementation Plan and specified its limited role for implementing each of President Trump's directives concerning accession, retention, and transition-related care. ER.211.

III. District Courts Enjoin the Ban.

Plaintiffs, a group of individuals and organizations whose members are harmed by the Ban, brought this action on August 28, 2017. After briefing and argument, the district court preliminarily enjoined the Ban on December 11, 2017.

ER.32. It was neither the first nor the last to do so; ultimately, a total of four courts preliminarily enjoined the Ban. *See Doe 1 v. Trump*, 275 F. Supp. 3d 167 (D.D.C. 2017); *Stone v. Trump*, 280 F. Supp. 3d 747 (D. Md. 2017); *Stockman v. Trump*, No. 17-CV-1799, Dkt. 79 (C.D. Cal. Dec. 22, 2017).

The district court concluded that Plaintiffs had established a likelihood of success on all their claims. ER.45. Applying heightened scrutiny, the court held that Defendants failed to show how any important governmental interest was advanced by the Ban. ER.47. In fact, all of Defendants' proffered reasons were "not merely unsupported, but [were] actually *contradicted*" by the extensive study and judgment of military leaders in developing the Carter policy. *Id.* Among other things, transition-related medical costs were at best "exceedingly minimal" and, according to military leaders, mere "budget dust." ER.47-48. Concerns about deployability were also unavailing given that "*all* service members might suffer from medical conditions that could impede performance." ER.48. And claims of harm to military readiness actually cut *against* the government: prohibiting open service would have "negative impacts including loss of qualified personnel, erosion of unit cohesion, and erosion of trust in command." ER.47; SER.142.

Balancing the equities, the court found that Plaintiffs were exposed to irreparable constitutional harms, including the loss of their careers, while the government would "face no serious injustice in maintaining the June 2016 Policy

pending resolution of this action on the merits," ER.52, especially since the Carter policy was "voluntarily adopted by DoD after extensive study and review." ER.52-53. Accordingly, the court enjoined Defendants from "taking any action relative to transgender individuals that is inconsistent with the status quo that existed prior to President Trump's July 26, 2017 announcement." ER.54.

Defendants noticed an appeal and moved both the district court and this Court to stay the injunction. The district court denied that request. SER.11-12. Defendants then voluntarily dismissed their appeal in December 2017 before this Court could rule on their stay motion. No. 17-36009, Dkt. 21. By that point, both the Fourth and D.C. Circuits had rejected similar stay motions. *Stone v. Trump*, No. 17-2398, Dkt. 31 (4th Cir. Dec. 21, 2017); *Doe 1 v. Trump*, No. 17-5267, Doc. 1710359 (D.C. Cir. Dec. 22, 2017).

IV. The Implementation Plan.

On January 25, 2018, Plaintiffs moved for summary judgment. On March 23, 2018, after briefing was complete, Defendants released the Implementation Plan that President Trump had ordered. ER.158. That Implementation Plan consisted of two components: (1) the panel's report and recommendations dated February 2018, ER.163-207, and (2) a memorandum from Secretary Mattis to President Trump, ER.160-62, dated February 22, 2018. Both were consistent with the 2017 Memorandum's deadline for a plan to implement the Ban. The military's

own documents draw a literal straight line beginning with the 2017 Memorandum to the Implementation Plan, shown as the last step in a "TG Policy Development Timeline." SER.92.

As directed, the Implementation Plan executes each of the directives in the 2017 Memorandum:

Accessions. The Implementation Plan implements the ban on openly transgender individuals joining the military. It specifies that those "who require or have undergone gender transition are disqualified from military service" and those who have not transitioned will be disqualified unless they suppress their gender identity and serve in their birth-assigned sex. ER.161-62. Where the Carter policy permitted accession after at least 18 months of stability, including the absence of gender dysphoria, no period of stability following transition would ever be sufficient under the Implementation Plan. ER.161. Although claiming to rely on newfound experience after the Carter policy's implementation, the panel's report was dated February 2018—just one month after the first transgender recruits were allowed even to begin the application process for joining the military.

Retention. As directed, the Implementation Plan reinstates the prior ban on open service for transgender people. ER.161-62. Pursuant to President Trump's directive that DoD "determine how to address transgender individuals currently serving," ER.215, the Implementation Plan creates a limited "reliance" exception

for those who received a gender dysphoria diagnosis after the Carter policy and before the effective date of the Implementation Plan. ER.161. But that exception will be severed if it is used to invalidate the Implementation Plan. *Id.*

Medical Care. The Implementation Plan bars transition-related care by disqualifying those "who require gender transition" from either accession or retention. ER.162.

The Implementation Plan met with immediate condemnation by leading medical organizations on the grounds that "there is no medically valid reason" to ban open service, and that the Plan "mischaracterize[s] and reject[s] the wide body of peer-reviewed research" to go against the overwhelming medical consensus. SER.133. Similarly, four Service Chiefs recently contradicted the panel's report in sworn congressional testimony. SER.83-84, 96-97, 107-09. For example, Army Chief of Staff General Mark Milley testified that he has "monitored" open service "very closely," and has "received precisely zero reports … of issues of cohesion, discipline, morale, and all those sorts of things." SER.96-97.

On the same date Defendants released the Implementation Plan, President Trump issued a memorandum ("2018 Memorandum"), which confirmed that, "[p]ursuant to" his 2017 memorandum, DoD had submitted the Implementation Plan he previously ordered and purported to "revoke" his earlier Memorandum and authorize DoD "to implement any appropriate policies concerning military service

by transgender individuals." ER.158. Arguing the Ban had thus been "revoked," Defendants moved to dissolve the preliminary injunction.

V. The District Court Finds the Implementation Plan is Not a New Policy and Maintains the Preliminary Injunction.

The district court held its previously-scheduled summary judgment argument on March 27, 2018, and ordered the parties to submit supplemental briefs addressing the Implementation Plan. After reviewing those briefs and "carefully consider[ing]" the Implementation Plan, the district court rejected Defendants' request to dissolve the injunction. ER.26.

In particular, the court rejected Defendants' claim that their purportedly new "plan resolves the constitutional issues raised by Plaintiffs," finding that "the 2018 Memorandum and the Implementation Plan do not substantively rescind or revoke the Ban, but instead threaten the very same violations that caused it and other courts to enjoin the Ban in the first place." ER.2, 12. This was especially true given that the 2017 Memorandum "did not direct Secretary Mattis to determine *whether* or not the directives should be implemented, but instead ordered the directives to be implemented by specific dates and requested a plan for *how* to do so." ER.12. It was exactly what the President requested. The court also analyzed the "exceptions" supposedly distinguishing the Implementation Plan from the pre-Carter policy but concluded that a purported exception for those serving in their "biological sex" "does not constitute 'open' service in any meaningful way, and

cannot reasonably be considered an 'exception' to the Ban." ER.13.

For all of these reasons, the court ruled that the preliminary junction should remain in effect. ER.30. In doing so, the court did not ignore the Implementation Plan—it simply rejected Defendants' attempt to ignore all the events that led up to it. *See* ER.2.

The court likewise considered and rejected Defendants' renewed standing arguments, finding that the Ban continues to deny transgender people an equal opportunity to apply for accession on the same terms as others. ER.15. It also found that currently-serving plaintiffs, including Plaintiff Jane Doe who has not disclosed her transgender status to the military and is subject to discharge under the Implementation Plan, are similarly denied "the opportunity to serve in the military on the same terms as others" and stigmatized. ER.15-17.

Finally, the court held that strict scrutiny governed Plaintiffs' equal protection claim, because transgender people meet all the hallmarks for strict scrutiny, ER.20-24, including that "transgender people have long been subjected to systemic oppression and forced to live in silence." ER.2. The Court declined to grant summary judgment in full, however, finding that it needed additional facts concerning the purportedly deliberative process surrounding the Implementation Plan before issuing permanent relief. ER.28.

Defendants appealed the denial of their dissolution motion and sought a stay

of the preliminary injunction from the district court and this Court. On June 15, 2018, the district court denied the stay request, finding that Defendants had not shown they were likely to succeed in this appeal nor shown irreparable harm. SER.3-5. The district court found that Plaintiffs would face irreparable harm without the preliminary injunction, which also serves the public interest. SER.5.

SUMMARY OF ARGUMENT

1. Defendants fail to show a significant change in law or fact to justify dissolving the preliminary injunction, after dismissing their appeal when the injunction was issued. The Implementation Plan came as a surprise to no one: President Trump had already made clear that the military's responsibility was to implement the Ban. The Implementation Plan thus retains the central, defining feature of the Ban: it bars transgender people from serving openly. The potential availability of a reliance exception, which the military cautions can be severed, does not transform the Implementation Plan into a "new" policy. The report purporting to justify the Ban was similarly constrained: whatever independent judgment the military brought to bear, it was limited to determining how to implement the Ban—not whether to do so.

2. The Ban requires heightened scrutiny under Plaintiffs' equal protection, due process, and First Amendment claims. The Ban targets a vulnerable minority already subject to a long and ugly history of irrational

discrimination for even more discrimination—a quintessential case for strict scrutiny. And because discrimination against transgender people is also inherently based on sex, the Ban requires intermediate scrutiny at a minimum. Under due process and the First Amendment, heightened scrutiny is required as well, because the Ban penalizes transgender people for exercising the basic right to live in accordance with one's gender identity.

Military deference does not shield the Ban from heightened scrutiny any more than it would shield military discrimination based on race or religion. That is particularly true here, where President Trump did not rely upon the professional judgment of military authorities *before* announcing the Ban, but rather ordered the military to supply him with a preordained report *after* he decided the Ban.

In any event, the Ban fails any level of scrutiny. It hinges on the characterization of all transgender people as permanently psychologically damaged for purposes of military service, which the medical community has condemned. It does not matter whether a transgender person's gender dysphoria has been resolved for eighteen months—as required for accession under the Carter policy—or eighteen years; the Ban deems that person permanently unfit to wear our nation's cloth. That sweeping exclusion cannot be justified by readiness concerns, let alone by budget dust or the government's prejudice-laden appeal to unit cohesion.

While the Ban excludes qualified individuals whose gender dysphoria has

been resolved, it simultaneously coerces others to forgo transition entirely and thereby incur the precise mental health risks that the military supposedly wishes to avoid. The Ban thus does not merely fail to further its purported objectives; it actively works to undermine them. Indeed, the government's willingness to incur these risks—all to pressure transgender people to express the gender that the government prefers for them—speaks volumes about the motivations for the Ban.

3. The balance of equities also tips sharply in Plaintiffs' favor. As candidly confirmed by the military's own Service Chiefs, maintaining the status quo would not harm the government. Indeed, it strengthens readiness. Immediate implementation of the Ban, on the other hand, would inflict widespread constitutional harms and unleash chaos upon transgender people seeking to serve and those who are already serving but who remain in peril under the Ban.

4. Finally, like every court enjoining the Ban, the district court did not abuse its discretion in issuing a preliminary injunction that matched the scope of the government's threatened constitutional violations.

STANDARD OF REVIEW

A party seeking to dissolve an injunction may not use its request as a vehicle to challenge the original issuance of the injunction. *Gon v. First State Ins. Co.*, 871 F.2d 863, 866 (9th Cir. 1989). Because a party that failed to appeal the issuance of an injunction "cannot regain its lost opportunity" simply by later filing

a motion to dissolve it, this appeal is limited to the propriety of the denial of the dissolution motion and the "new matter" presented. *Id*.

The party seeking dissolution bears the burden of showing a "significant change in facts or law." *Sharp v. Weston*, 233 F.3d 1166, 1170 (9th Cir. 2000). The denial of a dissolution motion is only reversible where the district court abused its discretion or based its ruling on an erroneous legal standard or on clearly erroneous factual findings. *Id.* at 1173.

A preliminary injunction is appropriate under either of two tests: (1) where the plaintiff is likely to succeed on the merits, the plaintiff faces likely irreparable harm, the balance of hardships tips in the plaintiff's favor, and an injunction serves the public interest, or (2) where there are at least "serious questions" on the merits, the plaintiff faces likely irreparable harm, the balance of hardships tips "sharply" in the plaintiff's favor, and an injunction serves the public interest. *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131, 1135 (9th Cir. 2011).

ARGUMENT

I. The District Court Did Not Abuse Its Discretion in Finding that the Implementation Plan Was Not a "New" Policy.

The foundation of Defendants' entire appeal is the fiction that they have now developed a "new" policy that is materially different from the Ban dictated by President Trump and thus cleansed of its gross constitutional violations. As explained below, the district court correctly found that the Implementation Plan is

not a new policy at all, but rather the expected and mandated outcome of President Trump's directives. Because that factual finding is not clearly erroneous, Defendants have failed to make their threshold showing of a "significant change in facts or law" required to dissolve the injunction. *Sharp*, 233 F.3d at 1170. The Implementation Plan cannot be divorced from its unconstitutional origins.

A. The Implementation Plan Executes the Key Features of the Ban.

First, the district court correctly concluded that the Implementation Plan "do[es] not substantively rescind or revoke the Ban, but instead threaten[s] the very same violations that caused it and other courts to enjoin the Ban in the first place." ER.12. The 2017 Memorandum prohibited the accession of openly transgender people, authorized the discharge of openly transgender service members, and barred transition-related surgical care. The Implementation Plan perpetuates each aspect of that policy: it continues to bar the accession of openly transgender people; it continues to authorize the discharge of openly transgender service members; and it continues to bar transition-related surgical care by authorizing the discharge of those who seek to transition. ER.12-13.

None of Defendants' arguments alter these basic facts. Defendants first contend that the Implementation Plan now turns on gender dysphoria rather than transgender status. But that is belied by the fact that the Ban flatly prohibits openly transgender people from serving, including those whose gender dysphoria

has been resolved through gender transition. ER.161-62. And, in any event, discrimination based on gender dysphoria is inextricably based on transgender status. *Cf. Christian Legal Soc'y v. Martinez*, 561 U.S. 661, 689 (2010) (targeting same-sex conduct necessarily targets the status of being gay); *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 270 (1993) ("A tax on wearing yarmulkes is a tax on Jews."); *Pac. Shores Props., LLC v. City of Newport Beach*, 730 F.3d 1142, 1160 n.23 (9th Cir. 2013). Defendants split hairs in arguing otherwise. The subject line of their various policy memoranda—"Military Service by Transgender Individuals"—leaves no doubt who is targeted by the Ban. ER.160, 214.

Next, Defendants insist that the Implementation Plan differs from the pre-Carter policy, and "substantially" departs from the policy that President Trump ordered in 2017, Defs.' Br. 42, because it allows service by people who have never transitioned, or needed to transition, and who have never experienced gender dysphoria. But that imagined group of people—who are perfectly content to live in their birth-assigned sex—describes those *who are not transgender*. To be sure, some transgender people may delay gender transition for various reasons, including because, like Plaintiff Jane Doe, they fear consequences from doing so. But penalizing gender transition invariably burdens all transgender people in their ability to live in a manner consistent with their gender identity, as others freely do. The Implementation Plan is thus not different from the return to the pre-Carter

policy that President Trump demanded in 2017.

The reliance exception, which can be severed and abandoned, also cannot transform the Implementation Plan into a "new" policy. This exception cannot conceal the sweeping disqualification of transgender people from military service that was present in the pre-Carter policy and that continues in the Implementation Plan. And because it was created in response to President Trump's order that the Implementation Plan "address transgender individuals currently serving," ER.215, it is decidedly not evidence of a "new" policy.

Similarly, Defendants maintain that the Implementation Plan contains another "exception" permitting transgender people to serve—so long as they do so in their birth-assigned sex. The district court recognized that this "cannot reasonably be considered an 'exception'" because "it would force transgender service members to suppress the very characteristic that defines them as transgender in the first place." ER.13. The government's position is tantamount to arguing that a ban on military service by Muslims contains an "exception" in that individuals may serve if they renounce Islam. As here, that is no exception at all.

B. The Implementation Plan Was Dictated and Constrained by President Trump's Directives.

Second, Defendants fail to show that the district court was clearly erroneous in rejecting the government's contention that the development of the Implementation Plan was "independent." The court found that President Trump

"did not direct Secretary Mattis to determine *whether* or not the directives should be implemented" but rather "requested a plan for *how* to do so." ER.12. It was not alone in this finding. *Stone*, 280 F. Supp. 3d at 763 ("The Court cannot interpret the plain text of the President's [2017] Memorandum as being a request for study to determine whether or not the directives should be implemented").

Defendants' claim of an "independent" process might have greater credibility if the Ban had organically emerged from the military *without* the military's Commander-in-Chief first communicating exactly what he expected the military to do, and if military professionals had not just *unanimously* rejected the basis for the Ban two years prior.[4] It strains credulity to claim—after President Trump's crystal-clear tweets and 2017 Memorandum—that military officials felt unfettered discretion to contradict and undermine their Commander-in-Chief. Despite Defendants' insistence that these officials were free to disagree with President Trump, doing so would run contrary to the inherent authority structure of the military. At a minimum, the district court, as the arbiter of fact, did not commit clear error in declining to credit Defendants' fiction based on the existing record.

The record is replete with evidence to support the district court's finding. ER.12. Secretary Mattis promised to "carry out the president's policy direction"

[4] The sheer unanimity of the working group that recommended open service—comprised of numerous representatives from across the military—also rebuts Defendants' contention that the Ban can be chalked up to one Secretary of Defense being less "risk-favoring" than his predecessor.

and convened a panel "to provide advice and recommendations on the implementation of the president's direction." ER.212. He thus instructed his subordinates to "develop[] an Implementation Plan … to effect the policy and directives in [the 2017] Presidential Memorandum." ER.210. That instruction is powerfully illustrated with respect to accessions: Secretary Mattis explained that the military had been "direct[ed]" by President Trump to "prohibit[] accession of transgender individuals into military service" and the military's task was merely to "update[]" that policy's guideline "to reflect currently accepted medical terminology." ER.211.

The government's claim of an independent process is also fatally undermined by the fact that President Trump did not even purport to "revoke" his 2017 Memorandum, or give the military "authority to implement any appropriate policies concerning military service by transgender individuals," ER.158, until March 23, 2018. Until then, the military was laboring under the directives imposed by the 2017 Memorandum; thus, any work performed during that period—including any "professional judgment" exercised to produce Secretary Mattis's February 2018 memorandum and the panel's report—was necessarily constrained by those limitations.[5] ER.161. And given that President Trump

[5] To the extent any presumption of "regularity" for government conduct could even be applied in the highly irregular circumstances here, that presumption favors Plaintiffs, because military officials were following President Trump's orders.

delegated the military authority to execute the policy at issue only *after* he first reviewed and approved the Implementation Plan, Defendants cannot credibly claim that the military was a superseding cause in the Ban's creation. ER.29.

Although Secretary Mattis also stated that the Implementation Plan was to include an "independent" review and study, ER.211, he explained that this meant that it was to be conducted "without regard to any external factors," ER.160. The Commander-in-Chief of the military, however, is not an "external" factor here; he was the one ordering the Implementation Plan. And whatever else an "independent" process might mean, there is no question that the Implementation Plan was not independent *of the 2017 Memorandum*—which is the relevant issue here—given that the Implementation Plan was indisputably prepared "[p]ursuant to" that Memorandum. ER.158.

Defendants also failed to carry their burden of showing that the Implementation Plan would have been developed but for President Trump's unconstitutional actions beginning in July 2017, much less that they now have new evidence to that effect. *See Hunter v. Underwood*, 471 U.S. 222, 228 (1985) ("Once [unlawful] discrimination is shown to have been a 'substantial' or 'motivating' factor behind enactment of the law, the burden shifts to the law's defenders to demonstrate that the law would have been enacted without this

factor.").[6] In June 2017, Secretary Mattis had directed only a six-month *pause* on the start of *accessions* for transgender recruits. That is a far cry from the sweeping scope of the Ban. Indeed, military leadership had confirmed in June 2017 that "there is no ongoing review that would affect the ability of [transgender personnel] currently serving to continue serving." ER.143. And the utter shock of military leaders when the Ban was announced belies Defendants' insinuation that the Ban was what military leaders had been planning all along. SER.136. Defendants have thus shown no "significant change," *Sharp*, 233 F.3d at 1170, and the district court did not abuse its discretion in denying their motion to dissolve.

II. Defendants Have Not Shown They Are Likely to Succeed on the Merits.

A. The Ban is Subject to Heightened Scrutiny.

Even if the Implementation Plan had been independently developed, it would still fail the rigors of heightened scrutiny. Discrimination based on transgender status is a suspect classification requiring strict scrutiny and, at a minimum, a sex-based classification requiring intermediate scrutiny. Separately, the Ban also triggers heightened scrutiny under the Due Process Clause and the First Amendment because it infringes upon the right to live in accordance with, and express, one's gender identity.

[6] None of this means that Secretary Mattis is forever tied to the policies of Secretary Carter, as the district court explained. ER.25. He must, however, show that he would have made the same decision but for any unconstitutional influence, and also that his proposed policies survive constitutional scrutiny.

1. Discrimination Against Transgender People Requires Strict Scrutiny.

The district court correctly concluded that all the indicia of a suspect classification requiring strict scrutiny are present here. ER.20. First, it is beyond dispute that transgender people have suffered a long history of discrimination, which remains pervasive. ER.21. Second, this longstanding discrimination is unrelated to transgender people's ability to contribute to society. ER.22. These first two considerations alone merit heightened scrutiny. *See Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 983 (N.D. Cal. 2012). Third, gender identity is an immutable or distinguishing characteristic. ER.22. Fourth, transgender people remain politically vulnerable to wrongful discrimination. ER.23. For all these reasons, the district court correctly recognized that "[t]he Ban specifically targets one of the most vulnerable groups in our society, and must satisfy strict scrutiny if it is to survive." ER.24; *see also F.V. v. Barron*, 286 F. Supp. 3d 1131, 1144 (D. Idaho. 2018). Defendants assert that courts should be "reluctant" to recognize suspect classes, but the judicial framework for identifying suspect classifications exists for good reason, and all four undisputed factors cry out for application of strict scrutiny here.

The district also correctly recognized, at a minimum, that discrimination against transgender people inherently constitutes sex-based discrimination triggering intermediate scrutiny, for multiple reasons. First, because a person's

gender identity is a sex-related characteristic, discrimination based on transgender status is necessarily discrimination based on sex. *Fabian v. Hosp. of Cent. Conn.*, 172 F. Supp. 3d 509, 527 (D. Conn. 2016). Second, discrimination because of one's gender transition—as exemplified by the Ban's targeting of those who "require or have undergone gender transition," ER.161—is also based on sex, just as firing an employee because she converts from Christianity to Judaism "would be a clear case of discrimination 'because of religion.'" *Schroer v. Billington*, 577 F. Supp. 2d 293, 306 (D.D.C. 2008). Third, discrimination against transgender people is rooted in sex stereotypes. As this Court has recognized, a transgender person's "inward identity [does] not meet social definitions of masculinity [or femininity]" associated with one's birth-assigned sex. *Schwenk v. Hartford*, 204 F.3d 1187, 1201 (9th Cir. 2000). Defendants' reliance on a single out-of-circuit case, Defs.' Br. 24, cannot overcome this precedent. *See Roberts v. Clark Cty. Sch. Dist.*, 215 F. Supp. 3d 1001, 1012-13 (D. Nev. 2016) (contrasting Ninth and Tenth Circuit approaches). Moreover, these general legal principles of sex discrimination are not "individualized, evidentiary, and statutory," Defs.' Br. 24 n.2, but instead apply fully to the equal protection claim here and require heightened scrutiny. *See Whitaker v. Kenosha Unified Sch. Dist.*, 858 F.3d 1034, 1051 (7th Cir. 2017); *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011).

2. Infringements on Due Process and First Amendment Rights Demand Heightened Scrutiny.

The Ban also triggers strict scrutiny because it penalizes transgender people for exercising the right to live openly in accordance with their gender identity, which is protected by both the Due Process Clause and the First Amendment.

First, all individuals, whether transgender or not, enjoy a fundamental right to live in accordance with their gender identity free of unwarranted governmental interference. Requiring transgender people to suppress their gender identity as a condition for military service strips them of a basic human liberty and equal dignity. The Due Process Clause protects people's right "to define and express their identity," *Obergefell v. Hodges*, 135 S. Ct. 2584, 2593, 2597, 2599 (2015), which is central to any concept of liberty, *Lawrence v. Texas*, 539 U.S. 558, 574 (2003). Indeed, courts protect as fundamental the right to make intimate decisions concerning marriage, procreation, family life, bodily integrity, and self-definition precisely because such decisions are core to each person's identity, central to an individual's dignity and autonomy, and can "shape an individual's destiny." *Obergefell*, 135 S. Ct. at 2593, 2597, 2599. These are decisions that people must be able to make for themselves, as they are essential to "retain[ing] their dignity as free persons." *Lawrence*, 539 U.S. at 558. "The right to identify our own existence lies at the heart of one's humanity." *Arroyo Gonzalez v. Rossello Nevares*, -- F. Supp. 3d --, 2018 WL 1896341, at *6 (D.P.R. 2018) (recognizing the right to

accurate identity documents reflecting one's gender identity). This Court has recognized that a person's gender identity is so fundamental that he or she cannot be required to abandon it. *Hernandez-Montiel v. INS*, 225 F.3d 1084, 1093 (9th Cir. 2000), *overruled on other grounds by Thomas v. Gonzales*, 409 F.3d 1177, 1187 (9th Cir. 2005). In short, just as non-transgender people are permitted to live in accordance with their gender identity, the Due Process Clause protects the right of transgender people to do the same.

Defendants protest that there is no fundamental right to serve in the military, but that misidentifies the right at issue, which is Plaintiffs' right to live in accordance with their gender identity, as the men and women they are. Notably, courts have also guarded against government intrusion upon similar basic liberties in the military context, including the right to form intimate relationships with a person of the same sex, *Witt v. Dep't. of Air Force*, 527 F.3d 806, 814-21 (9th Cir. 2008), and the right to have children, *Crawford v. Cushman*, 531 F.2d 1114, 1125 (2d Cir. 1976).[7]

Second, the Ban also requires strict scrutiny because it chills and penalizes the disclosure of one's transgender status and expression of one's gender identity protected by the First Amendment. President Trump sought to "prohibit[] *openly*

[7] Defendants assert that the Carter policy was equally guilty of due process violations, but that is erroneous. As President Trump explained, that policy "permit[ted] transgender individuals to serve openly," ER.214, whereas the Ban "directly interferes" with their ability to do so, ER.50.

transgender individuals" from military service, ER.214 (emphasis added), because he viewed them to be "disruption[s]," ER.216. The Ban punishes transgender service members who wish to express their gender identity with discharge and coerces them to express the gender preferred for them by the government.

The Ban penalizes speech by particular speakers with disfavored views. The military permits (and, indeed, requires) the expression of gender by virtue of its sex-based standards. But, under the Ban, it permits service members to express their gender identity only if they are not transgender.[8]

That silencing of some but not others is viewpoint discrimination. *See Log Cabin Republicans v. United States*, 716 F. Supp. 2d 884, 926 (C.D. Cal. 2010) (holding that allowing heterosexual but not gay service members to disclose their orientation was unconstitutional), *vacated on other grounds as moot*, 658 F.3d

[8] The Ban targets and chills two forms of protected First Amendment expression. First, it penalizes Plaintiffs for disclosing their transgender status by speech such as "I am transgender," or "I am a woman." By contrast, a female soldier who is not transgender may disclose that fact, and her gender identity, without consequence. Thus, the Ban attaches different consequences to the same speech based on who the speaker is, constituting impermissible viewpoint discrimination. *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 96 (1972). Additionally, courts long have recognized that speech and expression that discloses one's identity ("coming-out speech") receive constitutional protection under the First Amendment. *See, e.g.*, *Gay Students Org. of Univ. of N.H. v. Bonner*, 509 F.2d 652 (1st Cir. 1974) (in the context of sexual orientation). Second, and equally impermissible, the Ban prohibits speech and conduct in conformity with a person's gender identity, whether by explicit acknowledgement of one's gender (*e.g.*, "Please refer to me as she") or by serving as male or female. A service member who is not transgender may engage in such gendered expression free of repercussion.

1162 (9th Cir. 2011); *see also Giebel v. Sylvester*, 244 F.3d 1182, 1188 (9th Cir. 2001); *Nieto v. Flatau*, 715 F. Supp. 2d 650, 655 (E.D.N.C. 2010) (applying strict scrutiny, in the military context, to viewpoint discrimination). Defendants' straw-man response—that the disclosure of any medical information generally occurs through words—ignores that the Ban prohibits gender transition itself and the expression of one's gender identity. Defendants' claimed medical justification for facially restricting this expression, moreover, goes at most to whether the Ban survives strict scrutiny—not to whether it applies. *See Berger v. City of Seattle*, 569 F.3d 1029, 1051 (9th Cir. 2009).

3. Military Deference Does Not Displace Heightened Scrutiny.

Defendants assert that military deference trumps heightened scrutiny and requires rational basis review. Defs.' Br. 21. To reject that extraordinary position, this Court need look no further than Defendants' concession below that military affairs—including the composition of the military—are not immunized from heightened scrutiny: "no amount of deference could save the military's decision to exclude a race or religion from being considered under the strict scrutiny standard." Dist. Ct. Dkt. 69 at 30.

This Court and others have rejected attempts to suspend heightened scrutiny in the military context. Of particular relevance is *Witt*, which held that heightened scrutiny was required for a substantive due process challenge to "Don't Ask, Don't

Tell." 527 F.3d at 813, 821. That analysis is controlling here. First, this Court did not defer to the government's factual findings regarding unit cohesion, which was insufficient to support the wholesale exclusion of openly gay people from the military. *Id.* Second, this Court rejected Defendants' assertion of unbridled authority to choose among alternatives, holding that even intermediate scrutiny requires the military to show that "a less intrusive means [is] unlikely to achieve substantially the government's interest." *Id.* at 819. Strict scrutiny, of course, requires even narrower tailoring. Third, and contrary to Defendants' view that after-the-fact justifications are permissible, Defs. Br. at 21-22, this Court held that *post hoc* justifications are strictly forbidden, *Witt*, 527 F.3d at 819. *Witt* confirms that the core aspects of heightened scrutiny apply in the military context.[9]

The military plays a role in our constitutional structure; but it is equally the role of the judiciary to stand as the guardian of constitutional rights. "[T]here is not and must never be a 'military exception' to the Constitution." *Cammermeyer v. Aspin*, 850 F. Supp. 910, 915 (W.D. Wash. 1994). Even in the military, "the essence of individual constitutional rights nevertheless remain intact." *Dahl v. Sec'y of U.S. Navy*, 830 F. Supp. 1319, 1328 (E.D. Cal. 1993).

[9] Although *Witt* also indicated that its particular heightened-scrutiny test for liberty claims based on intimate conduct was developed for as-applied challenges, "nothing in *Witt* bars … a facial challenge" as a general matter. *Log Cabin Republicans v. United States*, No. 04-8425-VAP, 2009 WL 10671433, at *6 (C.D. Cal. Jun. 9, 2009).

It is also difficult to imagine a case where the extraordinary deference demanded by Defendants would be less appropriate than here. The district court found, based on the record before it, that the Ban "was devised by the President, and the President alone," without any supporting factual basis and *contradicted* by the military's own study. ER.29, 24. President Trump then instructed the military to justify his decision through a *post hoc* "study and implementation plan." ER.212; *accord* SER.4. Indeed, President Trump boasted that he had "[done] the military a great favor" by taking the decision away from them and "coming out and just saying it." SER.137-38. Such "reflexive[]" and unsupported actions are not entitled to deference. *Rostker v. Goldberg,* 453 U.S. 57, 72 (1981).

Defendants' authorities are not to the contrary. In *Rostker*, the Supreme Court relied on "civilian" sex discrimination cases requiring heightened scrutiny, *id.* at 79, declined "any further 'refinement' in the applicable tests" for sex discrimination based on the military context, *id.* at 69, and examined whether the policy at issue was "closely related" to an important government interest, *id.* at 79—all hallmarks of heightened scrutiny. *Rostker* is also factually distinguishable. It held that requiring only men to register for the draft was constitutional because women were excluded from combat positions at the time, which had not been challenged. *Id.* at 78. Here, however, the Ban is the only reason why transgender people who are otherwise fit to serve are barred from doing so.

Nor does *Goldman v. Weinberger*, 475 U.S. 503 (1986), support rational basis review. Rather, *Goldman* explains that, where deference applies, courts consider the military's judgment "concerning the relative importance of a particular military interest," *id.* at 507, but courts must continue to scrutinize the fit between the government's means and objectives, particularly under heightened scrutiny. That is precisely what this Court did in *Witt*. 527 F.3d at 821; *accord Log Cabin Republicans*, 716 F. Supp. 2d at 911. Furthermore, *Goldman* concerned a facially neutral rule generally barring headgear, which incidentally burdened the ability to wear a yarmulke. Whatever deference may be appropriate for such neutral line-drawing, it does not apply to the Ban's facially discriminatory targeting of transgender people.

B. The Ban Fails Any Level of Constitutional Scrutiny.

Defendants advance three purported governmental interests in defending the Ban, but each shares several independently fatal defects. To begin, none of them is based on the "significant change in facts" required to justify dissolution of the preliminary injunction. *Sharp*, 233 F.3d at 1170. In fact, Defendants take great pains to confirm they are *not* new, but rest on purportedly "different judgments" about previously-considered concerns. Defs.' Br. 30, *see also* 20-28. That alone dooms this appeal. Despite Defendants' efforts to relitigate the underlying preliminary injunction—an appeal of which they previously filed and abandoned—

the time for that has passed. A party cannot slip the strictures of a preliminary injunction by simply deciding to change its "risk calculus" or "judgment." And any "new evidence" purporting to justify the Ban (even if it existed) would flatly violate the settled prohibition against *post hoc* justifications under heightened scrutiny. *United States v. Virginia*, 518 U.S. 515, 535-36 (1996); *W. States Paving Co. v. Wash. State Dep't of Transp.*, 407 F.3d 983, 991, 993 (9th Cir. 2005).

But Defendants' rationales also fail on the merits. There is no connection between the Ban and the proffered governmental interests, let alone the close tailoring required under heightened scrutiny. Certainly, nothing about the purported governmental interests—all of which apply to non-transgender service members as well—justifies a blanket ban on transgender service members only. Where a classification's "sheer breadth is so discontinuous with the reasons offered" that it seems "inexplicable by anything but animus," it lacks even "a rational relationship to legitimate state interests." *Romer v. Evans*, 517 U.S. 620, 632 (1996).

1. Barring Qualified Individuals from Service Because They Are Transgender Does Not Further Military Effectiveness.

At the threshold, Defendants concede that their readiness arguments are not "new ones." Defs.' Br. 27. Those arguments also do not withstand even cursory scrutiny.

Psychological Fitness. Defendants primarily rely on a purported concern about subjecting service members with gender dysphoria "to the unique stresses of military life," suggesting that transgender people are psychologically unstable, and that their treatment is scientifically unproven. *Id.* 25. But these arguments were considered and rejected by the military in 2016. "[B]eing transgender is not a psychological disorder." *See, e.g.,* SER.291.

The medical community has likewise "definitively rejected" Defendants' view that every transgender person should be treated "as having a disabling mental health condition" regardless of whether they no longer experience gender dysphoria. SER.119. Indeed, the consensus of the AMA, the American Psychiatric Association, the American Psychological Association, and every other major professional medical organization is that being transgender is not a disorder and that gender dysphoria is treatable. SER.251. These medical organizations, former military leaders, and Surgeons General likewise have condemned the claims in the Implementation Plan as rooted in outdated, disproven assumptions regarding transgender people, and contradicted by the vast body of research showing that gender dysphoria is treatable and does not limit the ability of transgender people to serve. SER.15-17, 21-23, 27-40, 119, 132-34. As the AMA explained, the Implementation Plan "mischaracterized and rejected the wide body of peer-reviewed research on the effectiveness of transgender medical care," and

the overwhelming medical consensus that "medical care for gender dysphoria is effective." SER.133. There is, in short, no "scientific uncertainty" regarding the efficacy of treatment for gender dysphoria. ER.168.

Defendants nonetheless claim that a blanket ban on transgender recruits is necessary because of supposedly higher rates of psychiatric hospitalization and suicidal behavior for transgender people *as a group*.[10] This Court has highlighted the "constitutionally significant danger" of using a "surrogate" such as class membership for identifying purported harms. *Meinhold v. U.S. Dep't of Def.*, 34 F.3d 1469, 1478 (9th Cir. 1994). The district court also appropriately rejected the government's reliance on "extremely overbroad" justifications. ER.48.

Defendants offer no explanation why the rigorous individualized examination which all potential recruits must undergo—which directly screens for the specific mental health issues that purportedly concern Defendants—is somehow insufficient solely for transgender recruits. Under generally applicable standards, anyone with a history of suicidal behavior is barred from service. SER.123. And anyone with a history of anxiety or depression is barred from service unless they have been stable and without medical treatment for 24 or 36 consecutive months, respectively. SER.123-24. As a result, any transgender

[10] Defendants also note that transgender service members visit mental health professionals more frequently than their peers—but that ignores that Defendants *require* such appointments to obtain transition-related care. SER.125-26; SER.51-56.

person who actually has one of those conditions is already screened out without any need for a categorical ban. *Id.*

The same individualized screening is also used for gender dysphoria itself, which under the Carter policy must have been resolved for at least 18 months before a transgender applicant may join the military. Although Defendants assert that transition may not resolve gender dysphoria for everyone, the Ban irrationally excludes from accession those whose gender dysphoria *has* already been demonstrably resolved. Likewise, for those who transition while serving, the military already conducts individualized assessments of their fitness to serve—as illustrated by Plaintiffs' military-approved transition plans—just as it does for other conditions that require treatment during service. ER.504, 509, 515; *see also* SER.108 (Air Force Chief: "It is not a one-size-fits-all approach. It is very personal to each individual.").

The availability of individualized determinations is precisely why the military does not (and could not) target any other class the way the Ban does—even though women, for example, are twice as likely to have depressive disorders as men. SER.124. In addition, it is both callous and irrational for the government to invoke disparities arising from a pervasive history of discrimination as an excuse to heap more discrimination on that group. SER.123.

While the Ban excludes transgender people who are mentally fit from

service, it simultaneously undermines the mental health of other transgender people by coercing them to forgo transition entirely—and instead to serve in their birth-assigned sex—as a condition for military service. ER.161-62. But that would works to encourage the precise mental health risks that Defendants supposedly seek to avoid, by taking away the key tool to address those risks.

The Ban is also incoherent in other ways. Defendants invoke purported concerns about the strain of military service on those "with gender dysphoria"—but that is the group the government is ostensibly willing to retain under the reliance exception. ER.168-69. With the apparent goal of trying to moot some Plaintiffs' claims, Defendants have even belatedly attempted to *expand* that group from those diagnosed after the Carter policy, ER.168, to include those diagnosed before the policy, ER.489, even though the latter did not rely on that policy when diagnosed. At the same time, Defendants seek to exclude from accession individuals whose gender dysphoria has long been demonstrably resolved. SER.258; ER.317-18. None of Defendants' concerns about gender dysphoria rationally relate to the transgender recruits that they seek to categorically block from service.

Deployability. Defendants' concerns about deployability border on the disingenuous. They claim that transition-related care could render a transgender person non-deployable for up to two-and-a-half years, and burden non-transgender

service members, Defs.' Br. 28-29. But even if such extreme scenarios could be credited (and, as discussed below, they cannot), they would not justify the sweeping scope of the Ban. The military has adopted a universal requirement that service members will be separated if they are non-deployable for more than 12 consecutive months, SER.13-14, and the reliance exception expressly conditions retention of transgender service members on meeting this standard. ER.168. Under that universal standard, no one can be non-deployable for two-and-a-half years, regardless of whether they are transgender. And as the district court found, it is also "common" for service members to have limited periods of non-deployability due to a range of medical conditions. ER.48; SER.291. There is nothing unique about transition-related care to justify the Ban. SER.114-15.

"Again, these are not new concerns," as Defendants concede. Defs.' Br. 29. Nor is there any discernible connection between an interest in deployability and the Ban that was actually adopted. Any temporary limitations on deployability would apply to the transgender service members that Defendants are supposedly willing to retain under the reliance exception—as well as the non-transgender service members who are temporarily non-deployable for a range of medical conditions—not the transgender recruits Defendants seek to ban, who have completed their transition and demonstrated their stability for 18 months.

Laws that are "grossly over- and under-inclusive"—such as a restriction that

retains service members who need care and excludes those who do not—are "so poorly tailored" to any legitimate interest that they "cannot survive heightened scrutiny." *Latta v. Otter*, 771 F.3d 456, 472 (9th Cir. 2014). Indeed, the Ban fails even rational basis review. Pregnancy can also temporarily affect the performance of one's duties; but that does not justify singling out pregnant service members for discharge. *See, e.g.*, *Crawford*, 531 F.2d at 1121-25. Nothing about ensuring deployability explains Defendants' exclusion of transgender recruits who have no deployability restrictions. Defendants' stated concerns "ma[k]e no sense in light of how the [military] treat[s] other groups similarly situated in relevant respects." *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 366 n.4 (2001).

Defendants' deployability arguments also are undercut by their severe distortions of well-accepted science. For service members allowed to receive care while serving, the actual recovery time for the most common surgeries is only 2-8 weeks, and the initiation of hormone therapy takes 3-6 months. SER.130-31. In addition, transgender service members can schedule their medical appointments so they do not conflict with upcoming deployments, and the military can handle potential impacts to deployability in the same individualized way they do for non-transgender service members; there is no "unique" concern or "greater challenge" regarding transgender people. SER.161, 224.

Nor does anything about a transgender person's ongoing service after

transition support Defendants' arguments. Military policy allows service members to take a range of medications, including hormones, while deployed in combat settings. SER.113. The military effectively distributes prescription medication worldwide. SER.128. In fact, openly transgender service members have been deployed around the world and the panel's report fails to list a single incident where transgender service members were unable to obtain medication. SER.114. The risks associated with hormone therapy to treat gender dysphoria are not higher than for the hormones that many non-transgender military personnel receive. SER.259-60. Additionally, troops who have transitioned require only yearly monitoring for hormone treatment, "which is consistent with the yearly, routine laboratory health screenings that *all* active duty troops receive." SER.128.

Finally, any attempt to disguise the Ban's targeted discrimination as a desire for "caution" fails. Defs.' Br. 31. Proceeding cautiously does not explain Defendants' rush to *change* the status quo and institute a ban, "unlimited in time," on all transgender people save those under the reliance exception. *See Perry v. Brown*, 671 F.3d 1052, 1090 (9th Cir. 2012); *cf. Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294, 345-46 (D. Conn. 2012) ("[c]ategorizing a group of individuals as a 'vast untested social experiment' … [and] permitting discrimination until equal treatment is proven, by some unknown metric, to be warranted" would "eviscerate" equal protection).

2. Excluding Transgender People from Military Service Does Not Promote Unit Cohesion.

Defendants' unit cohesion arguments are likewise baseless. They rely on the sex-stereotyped view that a transgender person's existence is somehow "[i]ncompatible with [s]ex-[b]ased [s]tandards," ER.198, and requires "exempting" transgender service members "from the military's longstanding sex-based standards." Defs.' Br. 31. As explained below, this is untrue. But Defendants' claims again raise the threshold question: What significant change in facts requires dissolution of the preliminary injunction? The only arguably new fact in Defendants' brief—from the nearly two-year history of open service—is a single report of dual EEO complaints regarding a transgender woman's access to shower facilities. Defs.' Br. 32-33. But this is not new at all. It was reported to the panel of experts in October 2017, before Defendants voluntarily dismissed their appeal of the underlying injunction. ER.200 n.143. Defendants do not explain why this constitutes an urgent issue in the summer of 2018, but not when they dismissed their appeal in December. *See also* Defs.' Br. 35 (admitting that questions about unit cohesion and sex-based standards were also addressed "by the prior administration").

On the merits, Defendants' arguments rest on sex-stereotyped notions that have no basis in fact. Far from being "exempt" from "uniform and grooming standards," Defs.' Br. 35, transgender service members are subject to sex-based

standards at all times. *See, e.g.*, ER.284-85 (under the Carter policy, sex-specific standards for one's birth-assigned sex "still apply until [] transition is complete"); SER.157-58. Approval to transition in the service is a tightly controlled process requiring approval from one's commander, thereby "ensuring readiness by minimizing impacts to the mission (including deployment, operations, training, exercise schedules, and critical skills availability)." ER.250. Changing one's gender marker in the military's computer system, which governs one's gender for all purposes and allows that service member to be treated in accordance with their gender identity, SER.227, "represents the end of the gender transition process, and requires a commander's approval, consistent with that commander's evaluation of expected impacts on mission and readiness." SER.113 (quote omitted); ER.251. This rigorous process creates a bright-line rule that ensures the military can maintain sex-based standards where appropriate, including with regard to transgender personnel.

Ultimately, Defendants' claims distill down to the view that whether one should be treated as a man or woman—and whether one merits protection from sex discrimination—is solely a function of one's anatomy. ER.193 (a person's anatomical characteristics "should dictate which [sex-based] standards apply" to them). In other words, transgender people are supposedly not real men or women absent genital reconstructive surgery, and their presence undermines the very

nature of sex-based standards and spaces.[11] Defs.' Br. 33-34, 36. But transgender people use single-sex facilities in accordance with their gender identity throughout the country, and courts have repeatedly found that hypothetical "privacy" and other concerns have no basis in fact or law. *See Whitaker*, 858 F.3d at 1046-47; *M.A.B. v. Bd. of Educ. of Talbot Cty.*, 286 F. Supp. 3d 704, 724-26 (D. Md. 2018); *Doe v. Boyertown Area Sch. Dist.*, No. 17-3113, 2018 WL 3016864, at *9 (3d Cir. Jun. 18, 2018); *Students & Parents for Privacy v. U.S. Dep't of Educ.*, 2016 WL 6134121, at *28-29 (N.D. Ill. Oct. 18, 2016), *report and recommendation adopted by* 2017 WL 6629520 (N.D. Ill. Dec. 29, 2017).

Defendants speculate that allowing transgender women to adhere to female grooming standards "could" cause resentment among non-transgender men—whom Defendants presume will be jealous because they do not view transgender women as real women. Defs.' Br. 35. But that argument dishonors the character of Plaintiffs' comrades who are not transgender, and Defendants' sex-stereotyped views do not in any event satisfy rational basis review, let alone the burden Defendants must carry under heightened scrutiny. "To the extent this is a thinly-veiled reference to an assumption that other service members are biased against transgender people, this would not be a legitimate rationale for the challenged policy." *Doe 1*, 275 F. Supp. 3d at 212 n.10; *accord Witt*, 527 F.3d at 820 n.10.

[11] The Ban also disqualifies transgender people who have had surgical treatment.

Privacy interests were also considered at length by the military working group that developed the Carter policy, which heard evidence from "commanders and transgender service members who had been on deployment under spartan and austere conditions" that there had been no impact to "morale or unit cohesion." SER.115. For most service members, such concerns are "secondary" "at best compared to the other challenges and demands of military deployment," but "even in relatively harsh conditions, some privacy is usually available in showers and other facilities." *Id.*

In any event, clear instructions for accommodating privacy in sex-specific facilities were promulgated through service-specific guidance, and in an implementation handbook addressing berthing, restroom, and shower facilities. SER.174, 190, 205, 227, 229, 235; ER.296-97. The Carter policy "gave discretion to commanders" to "make appropriate accommodations concerning facilities where necessary, such as scheduling the use of showers or offering alternate facilities." SER.116. As a former military leader explained, allowing for "flexibility is not unusual on military deployments, nor is it limited to transgender service members." *Id.* (combat service by women and local conditions sometimes require flexibility, which can be accommodated without disruption).

The current Service Chiefs agree: they recently testified before Congress that they have seen no effect on unit cohesion by transgender troops. SER.83-84,

96-97, 107-09.[12] Where, as here, Defendants' claims are not supported by objective facts, and contradicted by military leadership, their reliance on conjecture that is "not susceptible to quantification" should be viewed with skepticism. ER.203. Similar intangible concerns about unit cohesion have historically been used to prevent African Americans from serving and to justify segregation, to exclude gay and lesbian troops, and to prevent women from serving in combat roles. *See, e.g., Watkins v. U.S. Army,* 875 F.2d 699, 729 (9th Cir. 1989) ("it is unthinkable that the judiciary would defer to the Army's prior 'professional' judgment that black and white soldiers had to be segregated to avoid interracial tensions") (Norris, J., concurring). Privacy was also the central justification for "Don't Ask, Don't Tell," based on arguments that heterosexuals would not want to share rooms and facilities with fellow service members who are gay. S.Rep. No. 112, 103d Cong., 1st Sess. 283 (1993) (statement of General Colin Powell). Those concerns were unfounded. *See Log Cabin Republicans*, 716 F. Supp. 2d at 954; *see also* SER.142 ("The now repealed DADT was problematic and flawed in similar ways as the ban on open service by transgender service members."). The military's successful integration of women into the military, despite similar purported privacy concerns, further undercuts Defendants' position. *See Virginia*,

[12] Defendants argued below that reports of problems would not have reached these officials "due to reporting limitations in the Carter policy," Dkt. 261 at 5, which allegedly prohibit any "report that a problem emanated from a transgender." Dkt. 262-1 at 63. The Carter policy contains no such provision. ER.219-236.

518 U.S. at 540, 557.

Finally, Defendants speculate about risks of allowing transgender service members to physically engage with their peers in sports or combat, but fail to cite a single instance of such a problem. Defs.' Br. 34. Athletic competitions, including at schools across the country, already routinely allow males who are transgender to compete against other males and allow females who are transgender to compete against other females. Defendants argue that these are "legitimate military concerns" because *Virginia* recognized that it may be appropriate to make adjustments for physical training or privacy when women are admitted. Defs.' Br. 33-34. But Defendants misconstrue the lesson of *Virginia*: Where adjustments can be made to facilitate inclusion, they must—but any need for such adjustments does not immunize wholesale discrimination against all women or all transgender people. In any event, categorically banning transgender people from service is not a reasonable response to an imagined problem of perceived fairness in boxing competitions.

In sum, the two-year experience with open service has been consistent with the military's original expectations that unit cohesion would not be impaired. SER.226 (former Navy Secretary, who presided over the repeal of DADT and integration of women into ground combat, confirmed that open service for transgender service members "was relatively low-key, triggered fewer emotional

responses, and was viewed as 'no big deal'"). In fact, as the district court found—and the testimony of military leaders confirmed—*eliminating* open service would likely have an adverse effect on cohesion and morale, not maintain it. ER.47; SER.116, 231-33.

3. Unsupported Claims About Cost Savings Cannot Justify the Ban.

The district court also correctly rejected cost savings as a basis for the Ban. ER.48. Defendants claim that transition-related care is "proving to be disproportionately costly," ER.204; Defs.' Br. 36, but this is both factually unsupported and inadequate as a matter of law. The Implementation Plan nowhere quantifies the actual cost of transition-related care or compares it to the cost of medical care needed by other service members. In fact, as a dissenting opinion from the panel of experts pointed out, "the total cost of all medical treatment of the entire DoD transgender population over the past few years" is $3.3 million. SER.90. This falls far below RAND's upper-bound estimate of $8.4 million, ER.330-31—and even that was considered mere "'budget dust,' hardly even a rounding error, by military leadership." SER.230, 88 (the Implementation Plan is not "supported by the data provided to the panel in terms of military effectiveness, lethality, or budget constraints").

And again, the Ban bears no relationship to an interest in cost, because the group receiving transition-related care is the group Defendants are ostensibly

willing to retain through the reliance exception. ER.168, 489. An interest in cost savings also explains nothing about the desire to block transgender recruits whose medical transition is *complete*.

Regardless, the law does not permit discrimination against a group simply because it saves cost. Particularly where "the military already provides health care comparable to the services needed to treat transgender individuals," SER.256-57, the government's arguments about cost do nothing more than attempt to "justify [their] classification with a concise expression of an intention to discriminate." *Plyler v. Doe*, 457 U.S. 202, 227 (1982). That fails any level of constitutional scrutiny. *See, e.g.*, *Mem'l Hosp. v. Maricopa Cty.*, 415 U.S. 250, 263 (1974) (under heightened review, Defendants "must do more than show that denying … medical care … saves money."); *Diaz v. Brewer*, 656 F.3d 1008, 1014 (9th Cir. 2011) (where interest in "cost savings and reducing administrative burdens" "depend[s] upon distinguishing between homosexual and heterosexual employees, similarly situated," it "cannot survive rational basis review").[13]

III. Defendants Have Failed to Show that the Balance of Equities Now Favors Dissolving the Preliminary Injunction.

Defendants likewise have failed to show any significant change in facts such

[13] *Middendorf v. Henry*, 425 U.S. 25, 45 (1976), is not to the contrary. Defs.' Br. 38. A neutral decision that counsel will not be provided for anyone in summary court martial proceedings bears no resemblance to the Ban's targeted discrimination here.

that the balance of equities or public interest now tips in their favor or that Plaintiffs no longer face irreparable harm.

The district court correctly found that Plaintiffs continue to face significant harms under the Ban and rejected Defendants' mootness arguments. ER.15-17. It is well established that "[a]n alleged constitutional infringement will often alone constitute irreparable harm." *Goldie's Bookstore, Inc. v. Superior Court of State of Cal.*, 739 F.2d 466, 472 (9th Cir. 1984); *see also Klein v. City of San Clemente*, 584 F.3d 1196, 1207-08 (9th Cir. 2009); *Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 715 (9th Cir. 1997). Because the district court found that Plaintiffs remain likely to succeed on their equal protection, due process, and First Amendment claims, they also face irreparable harm. ER.2; SER.3-5.

Furthermore, this Court has repeatedly recognized that a "diminished … opportunity to pursue [one's] chosen profession … constitutes irreparable harm." *Ariz. Dream Act. Coal. v. Brewer*, 757 F.3d 1053, 1068 (9th Cir. 2014) (internal quotes omitted); *accord Small v. Avanti Health Sys.*, LLC, 661 F.3d 1180, 1187, 1191 (9th Cir. 2011) ("permitting an alleged unfair labor practice to reach fruition … *is* irreparable harm") (internal quotes omitted). Absent the preliminary injunction, the Ban will diminish each individual Plaintiff's career prospects within the military. *See, e.g.*, SER.145-50, 297; ER.496-99, 526-29. "Plaintiffs' entire careers may be constrained by professional opportunities they are denied today."

Ariz. Dream Act Coal., 757 F.3d at 1068.[14]

While no further harm is required to enjoin the Ban, the Ban also subjects Plaintiffs to the categorical presumption that they are not fit to serve merely because they are transgender. This publicly brands and stigmatizes Plaintiffs as second-class citizens. *See, e.g.*, ER.533, ER.502-05, ER.510. Policies that "stigmatiz[e] members of [a] disfavored group as 'innately inferior' … can cause serious non-economic injuries to those persons who are personally denied equal treatment solely because of their membership in a disfavored group." *Heckler v. Mathews*, 465 U.S. 728, 737-740 (1984) (citation omitted); *see also Obergefell*, 135 S. Ct. at 2606 ("Dignitary wounds cannot always be healed with the stroke of a pen.").[15]

The district court correctly found that the Ban inflicts irreparable harm on

[14] Defendants cite *Anderson v. United States*, 612 F.2d 1112 (9th Cir. 1979), for the proposition that damage to a service member's career is not irreparable injury, but that case concerned an injunction that mandated the hiring of a particular candidate. *Id.* at 1115. Here, Plaintiffs do not seek a mandate that they be retained or enlisted, but simply an even playing field on which to be judged.

Defendants also claim that a stronger showing of irreparable harm is required in the military context, citing *Hartikka v. United States*, 754 F.2d 1516 (9th Cir. 1985), but Plaintiffs easily satisfy any standard. *Cf. Cooney v. Dalton*, 877 F. Supp. 508, 515-16 (D. Haw. 1995) (finding irreparable harm and enjoining discharge where plaintiff raised constitutional claims and where there was greater stigma than the "usual circumstances" of an employment discharge). If the targeted exclusion of an entire class of Americans from the military without regard to their fitness to serve or any other legitimate justification is not sufficiently weighty to constitute irreparable harm, it is difficult to imagine what harm could.

[15] Defendant argues that stigmatic harm "accords a basis for standing only to those persons who are personally denied equal treatment," and strangely claims that "no plaintiff has alleged" such harm. Defs.' Br. 52 (quote omitted). Every Plaintiff submitted testimony about the denial of equal treatment wrought by the Ban, and it is hard to imagine how the harm could be more personal for them.

those who seek to serve by depriving them of an equal opportunity to do so. ER.15. Defendants complain that Plaintiffs Karnoski, Callahan, and D.L. have not "established that they would be otherwise eligible for military service," Defs.' Br. 51, but Defendants raised that exact argument before, and there is no new evidence to justify now dissolving the preliminary injunction on this basis. In any event, these Plaintiffs have testified that they are "ready and able" to pursue a military career, or in D.L.'s case, that he will seek to enlist once he meets the 18-month requirement. *See* ER.497, 527, 538. It is blackletter law that injury arises from "the inability to compete on an equal footing" with others, "not the loss of" the benefit itself. *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 508 U.S. 656, 666 (1993). Accordingly, a party "need only demonstrate that it is 'able and ready'" to pursue an opportunity—precisely as Plaintiffs have shown here—"and that a discriminatory policy prevents it from doing so on an equal basis." *Id.* Defendants suggest this principle applies only when one is "compet[ing]" against others. Defs.' Br. 51. But *Jacksonville*'s language is not so limited, and this Court has applied it in other contexts. *See, e.g.*, *Cole v. Oravec*, 700 F. App'x 602, 604 (9th Cir. 2017) (involving denial of access to benefits under crime victim statutes).

Defendants also counter that Plaintiffs Winters, Stephens, Lewis, Muller and Schmid, who are currently serving, suffer no harm because they are exempt from

discharge. ER.168, ER.489. But the government cannot moot a claim by voluntarily ceasing the illegal conduct; instead, it must show that "(1) there is no reasonable expectation that the wrong will be repeated, and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Barnes v. Healy*, 980 F.2d 572, 580 (9th Cir. 1992). The government's standard is "stringent"; it must be "absolutely clear" that the "wrongful behavior could not reasonably be expected to recur." *Rosebrock v. Mathis*, 745 F.3d 963, 971 (9th Cir. 2014) (quote omitted). Defendants' so-called "solemn promise" to retain existing some service members is not "the kind of permanent change that proves voluntary cessation." *Bell v. City of Boise*, 709 F.3d 890, 900-01 (9th Cir. 2013). Quite the opposite, Defendants suggest that they will revoke the exemption should it "be used by a court as a basis for invalidating the entire policy." ER.169; *see id.* (the exemption "is and should be deemed severable"). Defendants' promise thus is not so solemn after all, and it does not make any Plaintiff's harms less irreparable.

Defendants also argue that Plaintiff Doe could qualify for the exemption if she were to obtain a gender dysphoria diagnosis from a military medical provider. But she would have no protection if she were to begin that lengthy process and the government succeeded in dissolving the preliminary injunction before she received any diagnosis. Moreover, any "protection" afforded by Defendants that is

contingent on litigation and subject to revocation does not extinguish Plaintiffs' concrete and irreparable injuries. *See McCormack v. Herzog*, 788 F.3d 1017, 1024-26 (9th Cir. 2015) (revocable conditional offer of immunity did not moot constitutional challenge).[16] Rather, it prolongs them indefinitely.

At the same time, maintaining the status quo pending the outcome of this litigation would not harm Defendants and would further the public interest. "[I]t is always in the public interest to prevent the violation of a party's constitutional rights.'" *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (internal quotes omitted). Indeed, even after the preliminary injunction was issued, the district court again weighed the equities when the government sought a stay as to accessions, and it again found that they weighed in favor of Plaintiffs. SER.11-12. That is equally true now, given the absence of any relationship between banning transgender recruits and Defendants' imagined harms. Although Defendants insist the courts must defer to their "predictive judgments" of alleged harm if they are not permitted to immediately resume discriminating against qualified transgender people, the testimony of the military's own Service Chiefs confirms that the status quo is "steady as she goes." SER.5.

[16] Nor does *Clapper v. Amnesty Int'l USA*, 568 U.S. 398 (2013), help Defendants. *Clapper* recognized that standing can be "based on a 'substantial risk' that the harm will occur, which may prompt plaintiffs to reasonably incur costs to mitigate or avoid that harm." *Id.* at 414 n.5. That is Jane Doe's painful, everyday reality. To avoid the threat of losing her career, she has given up the expression of who she is on the most fundamental level, and serves in the shadows. ER.492-95. As the district court recognized, that is cognizable injury. ER.17.

IV. The Scope of the Preliminary Injunction Appropriately Mirrors the Scope of the Threatened Constitutional Violations.

Finally, the district court did not abuse its discretion in facially enjoining the Ban because of the widespread constitutional violations it threatened. Although Defendants objected to the scope of the injunction when it was issued—and even sought an emergency stay from this Court arguing that it was overbroad—they abandoned that appeal. Because Defendants now merely recycle those exact same legal arguments, their request to narrow the injunction is barred.

Their arguments also fail on the merits. "[T]he scope of injunctive relief is dictated by the extent of the violation established." *Hawaii v. Trump*, 859 F.3d 741, 786 (9th Cir. 2017) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979)), *vacated as moot*, 138 S. Ct. 377 (2017). When confronted with a facially unconstitutional scheme like the Ban, the appropriate remedy is not to surgically excise a handful of individuals from its reach; it is to enjoin enforcement of the scheme as a whole. *See, e.g.*, *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017) (refusing to stay portion of injunction that "covered not just [plaintiffs], but parties similarly situated to them"); *Washington v. Trump*, 847 F.3d 1151, 1166 (9th Cir. 2017) (declining to narrow scope of injunction); *Cty. of Santa Clara v. Trump*, 250 F. Supp. 3d 497, 539 (N.D. Cal. 2017) (enjoining government action "unconstitutional on its face, and not simply in its application to certain plaintiffs"). This principle applies with particular force to organizational plaintiffs.

See Ariz. Dream Act Coal. v. Brewer, 81 F. Supp. 3d 795, 810 (D. Ariz. 2015) (granting injunctive relief to all DACA recipients, particularly given harms faced by members of an organizational plaintiff), *aff'd*, 855 F.3d 957 (9th Cir. 2017).

Defendants' cited authorities are not to the contrary. In *Los Angeles Haven Hospice, Inc. v. Sebelius*, this Court confirmed that "there is no bar against nationwide relief … even if the case was not certified as a class action." 638 F.3d 644, 664 (9th Cir. 2011) (citation omitted). Indeed, in order to effectuate complete relief to even the individual plaintiffs here, a military-wide injunction is necessary to ameliorate the stigmatization of all transgender troops as second-class service members. Defendants also cite *Meinhold*, 34 F.3d at 1480, but the plaintiff there "sought only to have his discharge voided and to be reinstated," whereas Plaintiffs here sought facial relief. *Cf. Log Cabin Republicans*, 716 F. Supp. 2d at 888 (granting facial relief in facial challenge to "Don't Ask, Don't Tell"). Moreover, both sides agreed the regulation there could be construed so that only its application to Plaintiff was unconstitutional, rather than the regulation itself. *Meinhold*, 34 F.3d at 1479.

CONCLUSION

Because the district court did not abuse its discretion in denying the motion to dissolve the preliminary injunction, this Court should affirm in full.

Dated: June 26, 2018

Respectfully submitted,

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STATEMENT OF RELATED CASES

Appellees are not aware of any related cases pending in this Court as defined in Ninth Circuit Rule 28-2.6.

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the length limits permitted by Ninth Circuit Rule 32-1. The brief is 13,782 words, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on June 26, 2018. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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